UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

MUNGER, TOLLES & OLSON, LLP O/B/O AMERICAN MANAGEMENT SERVICES LLC, D/B/A PINNACLE,

Plaintiff,

Case No.: CV13-6890

v.

UNITED STATES DEPARTMENT OF THE ARMY,

Defendant.	

# DECLARATION OF PHIL COWLEY, SENIOR MANAGING DIRECTOR, CLARK REALTY CAPITAL, L.L.C.

- I, Phil Cowley, hereby declare as follows:
- 1. I am legally competent to make this declaration. This declaration is based on my personal knowledge of four U.S. Department of the Army (the "Army") military housing privatization projects in which Clark Realty Capital, L.L.C. serves as the non-member Manager of the Managing Member of the project and is also an affiliate of various service providers to such projects. This declaration is also based on my personal knowledge of the various other business activities of Clark Realty Capital, LLC and its affiliates (collectively, for purposes of this declaration, the "Companies"). I make this declaration in support of the Army's motion for summary judgment in the above-captioned case.
- 2. I am employed by Clark Realty Capital, L.L.C. as Senior Managing Director. I am knowledgeable of, and a signatory for certain actions at, the four Army military housing projects, in particular Fort Benning Family Communities LLC, Monterey Bay Military Housing

- LLC, Fort Belvoir Residential Communities LLC, and California Military Communities LLC (the "Projects"). I also serve as the Project Director at the Fort Benning Family Communities LLC project (the "Fort Benning Project"), coordinating the efforts of the various Fort Benning Project service providers, including the Developer and General Contractor, which are affiliates of Clark Realty Capital, LLC.
- 3. I have been employed by Clark Realty Capital, L.L.C. for approximately10 years. During that time I have experience with business development, real estate development, project management, and asset management of both military housing and non-military housing projects.
- 4. Fort Benning Family Communities LLC, Monterey Bay Military Housing LLC, Fort Belvoir Residential Communities LLC, and California Military Communities LLC are each public-private partnerships consisting of a private Managing Member with a membership interest and the United States of America with a membership interest. Each of these limited liability companies also contracts with certain other Companies to provide support to the Projects, such as asset management, construction, and development services.
- 5. I understand that the plaintiff, Munger, Tolles & Olson LLP ("Plaintiff"), submitted a request, pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), to the Army for documents relating to the Projects.
- 6. In correspondence dated November 19, 2013, and March 21, 2014, the Army identified and provided copies of the documents that the Army intended to release in response to Plaintiff's request (collectively, the "Responsive Documents"). An index of the Responsive Documents is attached to this declaration as **Exhibit A**.
- 7. The Projects and the Companies agreed that certain Responsive Documents could be released to Plaintiff without redaction. I understand that the Army has provided those

documents to Plaintiff. As for the remaining Responsive Documents, the Projects and the Companies object to the release of certain Responsive Documents in their entirety and object to the release of specific portions of other Responsive Documents, which were redacted in other litigation, because they contain confidential commercial and financial information. I understand that such information is subject to Exemption 4 to the FOIA, 5 U.S.C. § 552(b)(4), and the Trade Secrets Act. 18 U.S.C. § 1905, and is therefore protected from disclosure. I am familiar with the Responsive Documents and the redactions. I have conducted a line-by-line review of the Fort Benning Project documents redacted and withheld by the Army for the possible release of segregable information within those documents, but I have determined that there is no meaningful, reasonably segregable, non-exempt material that could be released. In addition, I have supervised the Project Directors for Monterey Bay Military Housing LLC, Fort Belvoir Residential Communities LLC, and California Military Communities LLC, and the Project Directors have reviewed the Responsive Documents pertaining to their respective Projects, made each specific redaction, and determined that there is no meaningful, reasonably segregable, nonexempt material that could be released.

#### I. Background of the Responsive Documents

8. The Companies were responsible for drafting the Responsive Documents and independently obtained, calculated, and compiled the data contained therein. As Project Director for the Fort Benning Project, I was heavily involved in preparing the documents relating to the Fort Benning Project that are at issue here (the "Project Documents"). Based on my responsibilities related to the military housing business and my interaction with the Project Directors for Monterey Bay Military Housing LLC, Fort Belvoir Residential Communities LLC, and California Military Communities LLC, I am knowledgeable regarding the documents relating to those projects at issue here (all Project documents referred to as "Project

- Documents"). Much of the content of the Project Documents is the result of extensive research, planning, forecasting, revision, and modification by one or more of the Companies.
- 9. The Project Documents detail, among other information, budgets, performance to budgets, deficits and surpluses, capital structures, technical drawings, growth assumptions, development plans, construction delivery schedules, construction phasing and scope plans, operational management structures, performance metrics, contract pricing, construction costs, service fees, account balances, project staffing, capital plans, and investment strategies for the corresponding housing construction projects. The Project Documents also contain, among other information, income statements, prices, cost schedules and summaries, funding sources and uses, budget amounts, fees, financial control systems, financial returns and contributions, cost escalation forecasts, incurred expenses, revenue projections, and generated cash flows. All of this confidential commercial and financial information is highly proprietary to the Projects and/or the Companies, and it is my belief that its disclosure could cause the Projects and/or the Companies substantial competitive injury.

#### II. The Companies Face Actual Competition in the Construction Industry

Documents are released to the public because the Companies face actual competition in all of the industries in which they operate. The Companies are privately held and it and its affiliates actively invest in, develop, finance, and manage well-known and award-winning real estate assets across the nation. The Companies operate within a number of different industries and have countless competitors. The Project Documents concern housing projects that are part of a larger military program, the Residential Communities Initiative ("RCI"). Within the RCI program itself, the Companies have at least seven competitors, including Equity Residential, Hunt Building Company, and Lincoln Property Company. *See* RCI website listing "Related

Sites," <a href="http://www.rci.army.mil/relatedsites/">http://www.rci.army.mil/relatedsites/</a>, a .pdf of which is attached hereto as **Exhibit B**. These firms not only compete with the Companies in the military housing sector, but also in other sectors of the construction and development market, including construction management and project finance. Due to the significant competition within all of these industries, securing and maintaining competitive advantages are essential to success. The type of information contained in the Responsive Documents, such as cost structure, capital structure, design, and schedule, are the typical areas of evaluation for each potential new business opportunity.

# III. <u>Disclosure of the Responsive Documents Would Cause Substantial Competitive</u> Injury to the Companies

- 11. The disclosure of the confidential commercial and financial information in the Responsive Documents could cause substantial competitive harm to the Companies.
- 12. As a threshold matter, the Companies do not disclose publicly their trade secrets or confidential commercial and financial information. Other than providing the Responsive Documents to the Army in connection with the Projects and producing certain Responsive Documents subject to protective orders and confidentiality designations in the context of litigation, the Companies attempts to protect release of documents similar in content to the Responsive Documents, or the information contained therein, to any person or entity outside of the Companies. The Responsive Documents contain confidential financial and commercial information that is not customarily disclosed to the public. It is my belief that release of this data could cause substantial competitive harm to the Companies in a number of different ways.
- 13. For example, the release of the Companies' confidential data could impair the ability of the Companies to secure future work because the Companies' competitors would consult the information in the Responsive Documents when drafting their own proposals or development plans and offer the same attractive aspects or distinguishing features that the

Companies offer. The Companies' confidential information could be highly valuable to their competitors who are also seeking to engage in military housing projects with the Army or who are seeking to enter into housing development projects with other organizations. Additionally, and beyond military housing, the Companies' confidential information would inform competitors how to structure and compete for public private partnerships other than military housing. To disclose the Companies' confidential information would reveal how the Companies budget, price, phase, manage, and structure their development projects. The Companies' competitors may then be able to present a more favorable proposal package to the Army, another government agency, or private customer, which would cause the Companies to lose business.

14. Specifically, the Army identified Modified Scope Plans as Responsive Documents for all of the Projects. For purposes of the Responsive Documents, a Modified Scope Plan is generally a document that describes the various aspects of a development project, including the development plan, construction plan, financial plan, legal and governance plan, and property management operations plan. The Companies developed the Modified Scope Plans for these Projects due to changing events and circumstances; thus, these documents in particular provide significant insight into the Companies' internal financial, risk management, and problem resolution processes. The Projects' Modified Scope Plans detail, among other things, how to decrease or eliminate expenses, work more efficiently, and generate additional revenue.

Disclosure of this information would allow the Companies' competitors to learn and implement the unique processes that the Companies have developed. The Companies' competitors could then benefit from these processes just as the Companies do, compromising the Companies' strategic competitive advantages. The Army also identified pro forma spreadsheets as Responsive Documents for three of the Projects. For purposes of the Responsive Documents, a

pro forma spreadsheet is a financial statement presenting actual and projected values based upon certain assumptions. A pro forma spreadsheet generally details potential or expected revenues, investment earnings, expenses, cash flow, debt service, equity, fees, and returns related to a Project.

- with the Army to adjust to the Modified Scope Plans and corresponding construction schedules so that the Projects would, among other things, achieve the Army's goals. These discussions were memorialized in the revised Modified Scope Plans, pro forma documents, emails between the Companies and the Army, and other files containing the Army's comments on the suggested revisions and the Companies' responses thereto. Disclosing the documents that contain indications of these discussions would reveal how the Companies addressed the Army's concerns and modified the Projects accordingly, thereby enabling the Companies' competitors to adopt the same practices and to draft more appealing proposals for future work. If the Companies' competitors are able to increase the attractiveness of their proposals by adopting some of the practices that the Companies have developed, the Companies could lose their competitive edge. The Companies' competitors may then win future work, which will cause the Companies competitive harm in both the military housing and construction industries.
- 16. As mentioned above, the content of the Responsive Documents was the result of adjustment and improvement to the Projects. For that reason, even the revisions themselves are telling because they indicate the obstacles that the Companies were facing and the modifications that the Companies made to effectively handle those issues. In particular, the Companies revised the Modified Scope Plans and pro forma documents throughout the initial development phases of the Projects. The evolution of those documents over the life of a project shows the methods and

procedures that worked well and those that did not. The confidential commercial and financial information in those documents provides a detailed blueprint for the management of a housing project, and contains the Companies' trade secrets. Such tactics are essential business tools that the Companies have developed over time, with extensive research, and through their experience in the development industry.

17. To disclose this information would allow the Companies' competitors to reap all of the benefits of these business tools without expending any of the cost to develop them.

Disclosure of this confidential commercial and financial information could also permit the Companies' competitors to achieve the same economies of scale, time savings, or investment rewards as the Companies achieve, thereby reducing or eliminating the Companies' competitive advantages. Such an outcome would certainly cause substantial competitive harm to the Companies.

# IV. Types of Confidential Commercial and Financial Information in the Project Documents

- 18. To facilitate the Court's review, the confidential commercial and financial information in the Responsive Documents has been segregated by type. The index at **Exhibit A** lists the Responsive Documents and, for each document, identifies the type or types of confidential commercial and financial information contained in that document.
- 19. The confidential commercial and financial information in the Project Documents falls into one of three primary categories: (1) confidential financial and pricing information, (2) confidential phasing and scheduling plans, and (3) proprietary technical drawings. The column in **Exhibit A** entitled "Category of Withheld Information" identifies, for each redacted page in the Responsive Documents, the category that covers the redacted information: pricing, scheduling plan, or technical drawing. The discussion of these three categories set forth below

provides the justification for each redaction in the Responsive Documents by cross-reference to the category identified in **Exhibit A**. Each category of information is protected from release under Exemption 4 to the FOIA and the Trade Secrets Act because its disclosure would cause substantial competitive harm to the Companies.

## A. Confidential Financial and Pricing Information

- 20. The Project Documents contain extensive confidential financial and pricing information pertaining to the Projects. The redactions denoted as "pricing" in Exhibit A are information that falls into this category and must be withheld for the following reasons. Such confidential financial and pricing information includes, but is not limited to, rent amounts, purchase prices, hard cost breakdowns, soft cost breakdowns, cost escalation forecasts, budget forecasts and analyses, past and present expenses, anticipated future expenses, investment strategies, returns on investment, financial controls, growth assumptions, service contract structures, and revenue projections. To disclose this information would enable a competitor to, among other things, underbid the Companies or present a more attractive economic proposal for a future construction project with the Army or with another organization. A competitor could ascertain the Companies' cost structures and offer lower prices to the Companies' current or future customers or business partners. The Companies' competitors could also learn where and how the Companies cut costs, eliminate waste, increase efficiency, and streamline their budgets. All of these are critical tasks in the construction industry, and the Companies have expended time, effort, and resources to perfect these practices.
- 21. To disclose this information would reveal the Companies' unique strategies, and the Companies' competitors could then adopt the same strategies and achieve the same savings, all without spending the same time, effort, and money to develop them. Moreover, the use of these strategies is not limited to the military housing industry; they apply to other non-military

construction and development projects. It is my belief that the release of such confidential financial and pricing information could therefore cause significant competitive injury to the Companies.

22. Additionally, the Project Documents contain cost breakdowns, cost schedules, budget descriptions and analyses, expense charts, net sale proceeds, revenue projections, cost escalation forecasts, the tables detailing funding sources and allocations, and the like that are located in. The Project Documents list the specific expenses that the Companies have incurred and will incur to complete the Projects, the current and anticipated levels of revenue, the amount of disposable funds available to the Companies, the savings achieved and expected, and comparable data. Particularly significant in this category are the original and subsequently revised pro forma documents, since these files contain highly confidential cost and pricing data. Disclosure of this information would enable a competitor to use these figures to reverse engineer the Companies' prices, profit margins, and financing structure. The Companies' profit margin, among other information, is highly sensitive and its disclosure would cause substantial competitive injury. For all of these reasons, the Companies could suffer substantial competitive harm if its confidential financial and pricing information were released.

### B. Confidential Phasing and Scheduling Plans

23. The redactions denoted as "scheduling plans" in Exhibit A are information that falls into this category and must be withheld for the following reasons. The construction phasing and scheduling plans, drawings, data, and procedures contained in the Project Documents are proprietary to the Companies. The land planning, design, and construction phases and schedule were a significant part of the proposals for the Projects. The Companies generated the specifications for the execution of each of these Projects and developed a model for phasing the construction work. Such information is not unique to the military housing context; rather, it has

applicability to other non-military construction projects. In fact, the Companies often use the same or similar development phasing and methodologies in their construction projects. To disclose the phasing and scheduling information in the Project Documents would provide the Companies' competitors with the blueprints for the Companies' business models, and would enable the Companies' competitors to use the Companies' business models, or any distinct aspect thereof, without expending their own time and resources to develop such a model.

24. Further, it is my belief that disclosing the Companies' phasing and scheduling plans could result in the loss of the Companies' distinct competitive advantage because the Companies' business model would become commonplace and would no longer be a discriminator in the market. It could cause substantial competitive harm to the Companies if its competitors were to learn the exact process that the Companies followed in executing a development project. To release the Companies' phasing and scheduling plans would also allow the Companies' competitors to take advantage of the unique cost saving mechanisms that the Companies have established and implemented as part of their business models, further eliminating the Companies' strategic edge.

## C. Proprietary Technical Drawings

25. The redactions denoted as "technical drawings" in **Exhibit A** are information that falls into this category and must be withheld for the following reasons. The construction system that the Companies have used and are using for the Projects is proprietary to the Companies and constitutes confidential commercial information. The type of construction employed and the materials used in the construction are proprietary to the Companies because they relate to the Companies' unique method for building homes and developments. These technical drawings can be used in other non-military construction projects. As such, it is my belief that the release of this information would cause substantial competitive injury to the Companies. Specifically, the

technical drawings in the Project Documents are confidential and proprietary to the Companies and fall into the category of commercial information. The Companies expended significant time and resources to draft and develop the technical drawings. To release this information could enable the Companies' competitors to use the Companies' drawings without incurring the same expenses, which would cause substantial competitive harm to the Companies.

#### V. Conclusion

- 26. The Companies submitted the Responsive Documents to the Army based on the understanding that the Army would keep these materials confidential.
- 27. The Responsive Documents contain commercial and financial information that the Army received in confidence in connection with agreements to develop military housing projects and the Companies submitted the Responsive Documents to the Army with the understanding that they would remain privileged and confidential. As stated above, the Responsive Documents also contain commercial and financial information concerning the Companies' performance of the Projects, as well as data regarding the Companies' revenues, profits, losses, and expenditures. It is my understanding that the categories of documents protected from release by Exemption 4 in the Army's FOIA regulations encompass the Responsive Documents.
- 28. As discussed in more detail above, it is my belief that the release of the Responsive Documents, including the Companies' confidential pricing information, phasing and scheduling plans, and technical drawings, could cause the Companies substantial competitive injury because this information could be used by the Companies' competitors to develop comparable pricing structures, anticipate and respond to the Companies' investment and proposal strategies, underbid the Companies on future work, or increase their own efficiencies and market

share. The disclosure of the confidential commercial and financial information in the Responsive Documents could therefore cause significant competitive harm to the Companies.

29. For the reasons stated above, the Responsive Documents should not be released.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on June 30, 2014.

Phil Cowley

Senior Managing Director Clark Realty Capital, L.L.C.

# **EXHIBIT A**

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		Army and FBFC	Атпу	FBFC	Phil Cowley	Casey Nolan	California	Monterey Bay
		Chart	Chart	Form of Disbursement Request	Email	Email	Modified Scope Plan	Modified Scope Plan
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16 September 2010	Benning MSP Pro Forma Draft 1	Benning MSP Pro Forma Final Version	20120517 California ODP Projection	Copy of California Pro Forma (to DA RCI)	Monterey December MSP Pro Forma FINAL
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Assistant Secretary of the Army for Installations & Environment (ASA IE&E)

Assistant Chief of Staff for Installation Management (ACSIM)

Installation Management Command (IMCOM)

**US Army Home Page** 

**US Army Housing OneStop** 

**ACQWeb**Office of the Under Secretary of Defense for Acquisition, Technology & Logistics

#### **Partners**

**Actus Lend Lease** 

**Balfour Beatty Communities** 

**Clark Realty Capital** 

**Equity Residential** 

**Hunt Building Company** 

**Lincoln Property Company** 

Michael's Military Housing Pinnacle Realty Management

Picerne Military Housing

**Quality Communities** for Army Families

RCI is dedicated to building quality residential communities for Soldiers and their families. To accomplish this requires dedicated support from Government, Industry, and the Congress.

RCI is truly about partnering with the private sector. Our Industry partners' expertise, Innovation, and willingness to work collaboratively with us have been keys to RCI's successes to date.

While visiting this website, you will learn about the goals, objectives and RCI accomplishments, the way we conduct business, our current challenges, and our pledge to improve the quality of life for our Soldiers and their families.



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